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FEDERAL COMMUNICATIONS COMMISSION
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March 9, 1998

VIA MESSENGER

Magalie Roman Salas, Secretary
Federal Communications Commission
1919 M Street, N.W.
Room 222; Stop Code 1170
Washington, D.C. 20554

Re: ET Docket No. 95-183
RM-8553

Dear Ms. Salas:

On behalf of James W. O'Keefe, enclosed herewith for filing are the original and four copies of his Petition for Reconsideration of the Report and Order and Second Notice of Proposed Rulemaking, 8 C.R. 3002, issued by the Federal Communications Commission (the "Commission") in the above-captioned rulemaking proceeding.

An extra copy of this filing is enclosed for date-stamping by the Commission. Please address any inquiries regarding this filing to the undersigned counsel for Mr. O'Keefe.

Very truly yours,

Andrea S. Miano

Enclosures


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**Before the**
**FEDERAL COMMUNICATIONS COMMISSION**
**Washington, D.C. 20554**

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

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| In the Matter of | ) | |
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| Amendment of the Commission's Rules Regarding the 37.0-38.6 GHz and 38.6-40.0 GHz Bands | ) | ET Docket No. 95-183<br>RM-8553 |
| | ) | |
| Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, 37.0-38.6 GHz and 38.6-40.0 GHz | ) | PP Docket No. 93-253 |

## PETITION FOR RECONSIDERATION

Pursuant to Section 1.429 of the Rules, 47 C.F.R. § 1.429, James W. O'Keefe ("O'Keefe") petitions for reconsideration of the Report and Order and Second Notice of Proposed Rulemaking, 8 C.R. 3002 (1997) (hereinafter "Report and Order") issued by the Federal Communications Commission ("FCC" or "Commission") in the above-captioned rulemaking proceeding. O'Keefe requests that the Commission reconsider that portion of its Report and Order announcing its intention to dismiss his applications for authority to construct and operate point-to-point microwave facilities in the 38.6-40.0 GHz ("39 GHz") frequency band.

Over the past two and a half years, O'Keefe has been subject to the Commission's evolving and incrementally prejudicial policies concerning the treatment of pending applicants for 39 GHz licenses. The Commission's licensing policy deprives pending applicants, such as O'Keefe, of both substantive and procedural due process rights and, therefore, cannot be allowed to stand.

*I. Background:*

On October 16, 1995, before the Commission initiated the subject rulemaking proceeding, O'Keefe filed 28 applications for 39 GHz licenses to serve various locations throughout the United States. These applications were accepted for filing on November 1, 1995.[1] O'Keefe's applications were filed within the sixty-day "cut-off" window triggered by the Public Notice of major modifications to the pending three and four channel license applications of WinStar Wireless Fiber Corp. ("Winstar").[2] Thus, in accordance with Section 101.45 of the Commission's Rules, formerly Section 21.31, O'Keefe's applications are mutually exclusive with Winstar's applications.[3] Moreover, pursuant to Section 101.45(c), formerly 21.31(c), no new "cut-off" period was triggered by the filing of O'Keefe's applications.

On November 13, 1995, in response to a petition for rulemaking filed by the Point-to-Point Microwave Section of the Telecommunications Industry Association ("TIA"), the Wireless Bureau (the "Bureau") imposed a freeze on the acceptance of new 39 GHz license applications in anticipation of the commencement of a rulemaking proceeding to adopt technical and licensing rules to govern the 37.0-38.6 GHz and the 39 GHz frequency bands.[4] The Bureau cited to the fact that the petition for rulemaking, if granted, would require new application processing and technical rules for these frequency bands.[5] The Bureau's Order did not address the treatment of pending mutually exclusive applications.

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1 See, Public Notice, Report No. 1159, rel. Nov. 1, 1995.

2 See, Public Notice, Report No. 1148, rel. Aug. 16, 1995.

3 See, Public Notice, Report No. 1975, rel. February 10, 1998. On December 1, 1995, Winstar filed Petitions to Deny against O'Keefe's applications. This pleading cycle was concluded on January 11, 1996. The Commission has not yet issued a decision on the merits of the issues raised in that proceeding.

4 Order, RM 8553, DA Report No. 95-2341, rel. Nov. 13, 1995.

5 NPRM & Order at ¶ 122.

On December 15, 1995, the Commission released its Notice of Proposed Rulemaking and Order, 11 FCC Rcd 4930 (1995) ("NPRM & Order"), setting forth, *inter alia*, its proposals for amending the licensing and technical rules for fixed point-to-point microwave operations in the 39 GHz bands. In doing so, the Commission announced, for the first time, its proposal to use auctions to license "the remainder of the 39 GHz band in the most expeditious manner."[6] However, the Commission also retroactively modified the November 13th freeze to include the *processing* of pending applications that were (1) mutually exclusive with others as of November 13, 1995, or (2) within the 60-day "cut-off" period for filing competing applications on or after November 13, 1995.[7] This freeze policy was described by the Commission as "interim" -- i.e. pending applications for new 39 GHz frequency assignments or for modification to 39 GHz licenses were to be held in abeyance and not processed "until further notice."[8] The Commission underscored that its intention in adopting the freeze was "to preserve the *status quo* in order that [it] may have the maximum flexibility in the instant rulemaking proceeding. In the event that [it] decide[s] to maintain [its] current rules for the 39 GHz band, the licensing process would continue as before."[9] Moreover, the Commission noted its concern "that the award of licenses in mutually exclusive situations under [its] current rules could lead to results that were inconsistent with the objectives of the rulemaking proceeding. Unless [it] take[s] this approach, [it] run[s] the risk of undermining [its] efforts to optimize the public interest in establishing fair and efficient licensing practices."[10]

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6 Id. at ¶ 104 (emphasis added)

7 Id. at ¶ 122.

8 Id. at ¶ 125.

9 Id. at ¶ 22.

10 Id. at ¶ 15 (footnotes omitted).

The NPRM & Order, therefore, temporarily deferred the processing of all pending mutually exclusive applications, including *both* O'Keefe's and Winstar's applications. The Commission made it clear that should it decide to use auctions to license spectrum in the 39 GHz band, it would do so *only with respect to the remaining* spectrum (i.e. that portion of the spectrum band that was not already licensed or applied for).

On January 17, 1995, the Commission issued its Memorandum, Opinion and Order, 6 C.R. 34 (1997) ("MO&O"), addressing the Petition for Reconsideration of the NPRM & Order filed by Commco, L.L.C., PLAINCOM, INC., and Sintra Capital Corporation, and a Petition for Partial Reconsideration filed by DCT Communications, Inc. The Commission continued the processing freeze on pending 39 GHz applications in order to avoid "undermining [its] efforts to optimize the public interest in establishing fair and efficient licensing practices."[11] The Commission justified its temporary freeze by stating:

> the Commission may take temporary measures to hold applications in abeyance pending its decision on the substantive matters upon which public comment is sought. Once the Commission provides such an opportunity for comment, it may, *if the record warrants*, change its rules in a manner that affects the disposition of pending applications Neither the November 13, 1995 freeze, nor the December 15, 1995 freeze, however, has decided the final outcome of any of the applications subject to the freeze.[12]

The Commission underscored that it would only revise its licensing rules if warranted by the record in this proceeding.

On November 3, 1997, the Commission released the subject Report and Order announcing, *inter alia*, its intention to dismiss, without prejudice, all pending 39 GHz license applications that were mutually exclusive as of December 15, 1995 (i.e. both O'Keefe's and Winstar's applications). In particular, the Commission held that "the best approach for

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11 MO&O at ¶ 15.

12 Id. at ¶ 10 (emphasis added).

processing pending mutually exclusive applications is to dismiss them without prejudice, and to allow these applicant to submit new applications under the competitive bidding rules established in this proceeding."[13] The Commission claimed that its decision to dismiss mutually exclusive applications was consistent with the goals of this proceeding, namely, "to foster competition among different service providers, to promote maximum efficient use of the spectrum, and to provide efficient service to customers by improving the licensing procedure."[14] The Report and Order did not constitute a dismissal order and, in fact, the Commission has yet to issue such an order.

On February 10, 1998, despite the fact its applications are mutually exclusive with O'Keefe's, and despite the announcement in the Report and Order that all mutually exclusive applications are to be dismissed without prejudice, the Commission granted Winstar's pending applications.[15]

*II. Legal Arguments:*

*A. When The Commission Retroactively Applies New Licensing Procedures To Pending Applications It Must Have A Concise and Reasoned Basis For Doing So That Is Warranted By The Record*

It is a fundamental principle of administrative law that agencies must articulate the basis on which their decisions are premised. Melody Music, Inc. v. FCC, 345 F.2d 730 (1965); Petroleum Communications, Inc. v. FCC, No. 92-1670, slip op. at 16-17 (D.C. Cir. May 13, 1994). This basis must be simple, clear and reasonable. Id. The Court of Appeals has

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13 Report and Order at ¶ 90.

14 Id. at ¶ 87.

15 See, Public Notice, Report No. 1975, rel. Feb. 10, 1998. This grant of authority to Winstar was in blatant violation of the Commission's rules and policies and will be addressed by O'Keefe in a separate Petition for Reconsideration pleading.

warned that when the Commission revises its rules it may not "'casually ignore' its prior policy" but instead must "deliberately" change it. Florida Cellular Mobile Communications Corp. v. FCC, 28 F.3d 191, 196 (D.C. Cir. 1994).

> The fact that an agency rule represents a change in course simply requires courts to make sure that prior policies are being deliberately changed, not casually ignored, and that the agency has articulated permissible reasons for that change.

Clinton Mem. Hosp. v. Shalala, 10 F.3d 854, 859 (D.C. Cir. 1993).

The Commission's decision to dismiss pending mutually exclusive 39 GHz applications is not warranted by the record in this proceeding. Nor has the Commission articulated any rational basis for dismissing pending mutually exclusive 39 GHz applications other than, perhaps, an apparent desire to maximize the amount of 39 GHz spectrum that it will have available to license pursuant to auction. If so, then it would be specifically prohibited by Section 309(j)(7)(A) of the Communications Act of 1934, as amended.[16]

The record in this proceeding is deficient on its face. The Commission's Order allocated only a single paragraph to explain why it was invoking the drastic sanction of dismissal of pending applications.[17] Pending mutually exclusive applicants such as O'Keefe had no warning that their applications would be dismissed outright. Until release of the Report and Order, the Commission had continuously characterized its processing freeze as an interim measure, and it had expressly stated that it would auction only the "remaining" portion of the spectrum for which no applications were pending.

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[16] 47 U.S.C. § 309(j)(7)(A). This section prohibits the Commission from basing a finding of public interest, convenience, and necessity in the context of invoking its auction authority on the expectation of Federal revenues.

[17] Report and Order at ¶ 90.

In Maxcell Telecom Plus, Inc. v. FCC, 815 F.2d 1551 (1987), the D.C. Court of Appeals held that the Commission's application of a new licensing policy to pending applicants was permissible only when applicants "suffered neither the deprivation of a right nor the imposition of new or unexpected liabilities or obligations . . .."[18] By contrast, in this case, the Commission has imposed a substantial and unexpected liability on O'Keefe and other similarly situated 39 GHz applicants. Now these dismissed applicants are required to assume the additional expense and time to prepare and file new license applications. And, if their applications are mutually exclusive with other newly filed applications, they will be required to incur a potentially significant expense to bid for that license at auction.

Although the Commission makes the generalized statement that the record warranted dismissal of pending applications, the Commission cited to only one commenter -- GTE Service Corporation ("GTE") -- that argued for the dismissal of pending mutually exclusive applications.[19] In fact, 35 parties filed comments, and 18 parties filed reply comments, in this proceeding.[20] All the other parties that filed comments in this proceeding, including TIA -- the organization that initiated this rulemaking proceeding -- supported processing pending mutually exclusive applications.

Finally, despite its claims to the contrary, the FCC's action is not "fair and efficient licensing practices." Despite the Commission's assertion that all pending mutually exclusive

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18 Maxcell at 1555 (emphasis added).

19 Id. at Appendix A. In fact, GTE only filed comments in this proceeding. They did not submit reply comments.

20 Id.

applications will be dismissed without prejudice, in reality, the Commission has arbitrarily dismissed some applicants (i.e. O'Keefe) *with prejudice*, by granting the mutually exclusive applications of Winstar.

### *B. Even Assuming That It Was Appropriate For the FCC to Dismiss Mutually Exclusive 39 GHz Applicants, It Did So In Contravention of Legal Precedent*

The Commission has stressed throughout this proceeding that its overarching goals were "to foster competition among different service providers, to promote maximum efficient use of the spectrum, and to provide efficient service to customers by improving the licensing procedure . . .."[21] The Commission justified its decision to dismiss all pending mutually exclusive applicants without prejudice and allow them to reapply for licenses pursuant to its revised geographic licensing regime on these very principles. However, by granting the mutually exclusive applications of Winstar, the Commission has effectively dismissed O'Keefe with prejudice. O'Keefe will not be able to apply for these licenses in accordance with the Commission's revised licensing regime because those licenses have already been awarded to Winstar. Thus, assuming *arguendo*, that the Commission is permitted to dismiss pending mutually exclusive 39 GHz applicants in this proceeding, the manner in which it has implemented this policy is in direct violation of Ashbacker Radio Corp. v. FCC, 326 U.S. 327 (1945).

The Court has explained quite clearly that Ashbacker requires that the "Commission use the same set of procedures to process the applications of all similarly situated persons who come

[21] Report and Order at ¶ 87.

before it seeking the same license."[22] For example, in Maxcell, the Court held that the Commission's retroactive application of its revised licensing procedures to pending applicants satisfied Ashbacker because "all persons seeking the [subject] license became equally subject to the lottery procedure."[23]

In Reuters Limited v. FCC, 781 F.2d 946 (1986), the Court warned that:

> it is elementary that an agency must adhere to its own rules and regulations. *Ad hoc* departures from those rules, even to achieve laudable aims, cannot be sanctioned, for therein lies the seeds of destruction of the orderliness and predictability which are the hallmarks of lawful administrative action.[24]

Moreover, the Court warned that an agency is not permitted "to deviate from its rules in order to achieve what it deems to be justice in the individual case."[25] By granting Winstar's mutually exclusive applications, without consideration of O'Keefe's applications, the Commission has conferred a direct benefit on one applicant at the expense of another similarly situated applicant. This is in direct contravention of Ashbacker and its precedent, and it is therefore illegal.

*III. Conclusion:*

For the reasons described above, the Commission's decision in its Report and Order to dismiss all pending mutually exclusive 39 GHz applicants must not be allowed to stand. The Commission failed to provide a concise or reasoned explanation for this decision anywhere in this proceeding as is required by legal precedent. Moreover, the Commission has prejudicially

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22 Maxcell at 1555.

23 Id. (emphasis added).

24 Reuters at 950 (citation omitted).

25 Id. Additionally, the Reuters Court held that "Ashbacker's teaching applies not to prospective applicants, but *only to parties whose applications have been declared mutually exclusive*." Thus, principles of fairness demand that the Commission consider only the rights of pending mutually exclusive applicants in this proceeding not prospective applicants for these licenses such as GTE.

implemented this policy by granting the applications of Winstar despite the fact they were mutually exclusive with those of O'Keefe in direct contravention of Ashbacker.

Respectfully submitted,

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Dated: March 9, 1998